No. 05-1240

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

ANDRE WALLACE

Petitioner,

v.

CHICAGO POLICE OFFICERS
KRISTEN KATO AND EUGENE ROY,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED March 22, 2006
CERTIORARI GRANTED June 19, 2006

INDEX

Relevant Docket Entries 1

Opinion of the Illinois Appellate Court,
People v. Wallace, No. 1-96-2299,
September 21, 1998 6

Opinion of the Illinois Appellate Court,
People v. Wallace, No. 1-00-0922,
August 31, 2001 24

District Court Memorandum Opinion,
March 30, 2004 ..... Pet.App. 30

District Court Memorandum Opinion,
October 26, 2004 ..... Pet.App. 37

Opinion of the Seventh Circuit,
March 8, 2006 ..... Pet.App. 1

Judgment Order, Seventh Circuit,
March 8, 2006 ..... Pet.App. 29

RELEVANT DOCKET ENTRIES

04/02/03	Complaint (Record Item No. 1)
07/03/03	Answer by defendants Kristen Kato and Eugene Roy to complaint (Record Item No. 4)
07/09/03	Motion by individual defendants for summary judgment (Record Item No. 5)
09/26/03	Memorandum by the Detectives Kristen Kato and Eugene Roy in support of their motion for summary judgment (Record Item No. 10)
09/26/03	Local Rule 56.1 statement of facts in support of their motion by the Officers Kristen Kato and Eugene Roy (Record Item No. 11)
09/26/03	Appendix filed by defendants Kristen Kato and Eugene Roy of court transcripts cited in the officers' Local Rule 56.1 statement of facts in support of their motion for summary judgment (Record Item No. 12)
09/30/03	Motion by defendant City of Chicago to dismiss portions of plaintiff's complaint (Record Item No. 14)
10/21/03	Response by plaintiff to defendant's Rule 56 statement (Record Item No. 16)

10/21/03 Memorandum by plaintiff in opposition to motion to dismiss portions of plaintiff's complaint (Record Item No. 17)

11/14/03 Response by detectives Kristen Kato, Eugene Roy to plaintiff's additional facts pursuant to Local Rule 56.1 (Record Item No. 20)

11/14/03 Reply memorandum by the Detectives Kristen Kato, Eugene Roy in support of their motion for summary judgment (Record Item No. 21)

03/30/04 Minute Order of 3/30/04 by Hon. Samuel Der-Yeghiayan: For the reasons stated on the attached memorandum opinion, the Court hereby grants defendants' motion for summary judgment except for the federal denial of a fair trial claim. The federal denial of a fair trial claim is denied without prejudice. Furthermore, the Court denies the defendant City of Chicago's motion to dismiss without prejudice. Status hearing set for 04/21/04 to stand. (Record Item No. 23)

04/21/04 Minute Order of 4/21/04 by Hon. Samuel Der-Yeghiayan: Status hearing held and continued to 07/28/04 at 9:00 a.m. The plaintiff is given until 04/28/04 to file an amended complaint. The defendants are given until 05/28/04 to answer, move or otherwise plead to the plaintiff's amended

complaint. If the defendants move to dismiss, the plaintiff's response is to be filed by 06/18/04 and the defendant's reply is to be filed by 06/25/04. (Record Item No. 24)

04/28/04 Amended complaint by plaintiff, terminating defendant City of Chicago (Record Item No. 25)

05/28/04 Answer by defendants Kristen Kato and Eugene Roy to the amended complaint (Record Item No. 26)

06/25/04 Second motion by defendants Kristen Kato, Eugene Roy for summary judgment; memorandum in support; second Local Rule 56.1 statement of facts (Record Item No. 29)

07/16/04 Memorandum by plaintiff in opposition to second motion for summary judgment (Record Item No. 30)

07/16/04 Response by plaintiff to defendants' Rule 56 statements (Record Item No. 31)

07/23/04 Reply memorandum by defendants Kristen Kato, Eugene Roy in further support of their second motion for summary judgment (Record Item No. 32)

07/23/04	Consolidated second Local Rule 56.1 statement of facts and plaintiff's additional facts by defendants Kristen Kato, Eugene Roy (Record Item No. 33)
07/31/04	Motion by Defendants Kristen Kato, Eugene Roy to amend their answer to the amended complaint (Record Item No. 48)
08/11/04	Memorandum by plaintiff in opposition to defendants motion to amend answer (Record Item No. 35)
08/18/04	Reply brief by defendants Kato and Roy in further support of their motion to amend their answers to the amended complaint (Record Item No. 36)
09/27/04	Motion by defendants to supplement their 56.1 statement of facts by submitting exhibit D (Record Item No. 37)
09/30/04	Minute Order of 9/30/04 by Hon. Samuel Der-Yeghiayan: Defendants Kato and Roy's motion to supplement their 56.1 statement of facts by submitting Exhibit D is granted without objection (Record Item No. 39)
10/28/04	Minute Order of 10/28/04 by Hon. Samuel Der-Yeghiayan: Status hearing held on 10/26/04. For the reasons stated in the attached memorandum opinion, Kriston Kato and Eugene Roy's motion

for leave to amend their answer to the amended complaint is granted. Furthermore, Kristen Kato and Eugene Roy's second motion for summary judgment is granted in its entirety. (Record Item No. 40)

10/28/04 Entered judgment (Record Item No. 41)

11/15/04 Notice of appeal by plaintiff Andre Wallace (Record Item No. 42)

No. 1-96-2299
IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

ANDRE WALLACE,

Defendant-Appellant.

OPINION

[September 21, 1998]

Justice GALLAGHER delivered the opinion of the court:

Following a bench trial, defendant Andre Wallace was convicted of first degree murder for the shooting death of Herb Handy. The trial court sentenced defendant to serve a term of 26 years in the Illinois Department of Corrections on the first degree murder conviction. Defendant next filed this appeal, asserting: (1) the trial court erred in denying defendant's motion to quash his arrest and suppress statements; (2) the assistant State's Attorney who transcribed defendant's inculpatory statement improperly advised him of his *Miranda* rights; (3) the trial court erred in excluding defense evidence regarding the victim's allegedly violent and aggressive character; (4) the trial court erred in admitting prejudicial hearsay offered into evidence by the State; and (5) defendant's conviction for first degree murder should be reduced to second degree murder because defendant was sufficiently provoked by the victim.

The victim, Herb Handy, was shot and killed on January 17, 1994, at 825 North Lawndale Avenue in Chicago. Handy had been hired by a real estate company to housesit the residence at that address. The police recovered several 9 millimeter shell casings from the murder scene, and another housesitter, Robert Banks, claimed to have encountered the assailant face-to-face after the shooting. On January 19, 1994, Chicago police officers took defendant to the Area 4 police station for questioning regarding Handy's death. On January 20, 1994, defendant was arrested for the murder of Handy. At the time of the murder, defendant was 15 years old.

Conflicting testimony was offered at the hearing on defendant's motion to quash his arrest and suppress statements. Laron Jackson, testifying on behalf of defendant, stated that he and defendant were walking along the 800 block of North Lawndale Street in Chicago at approximately 8 p.m. on January 19, 1994. At that time, several police officers arrived and stopped Jackson and defendant. The police then searched the two young men, handcuffed them, placed them in a police car and drove them to the Area 4 police station at Harrison and Kedzie Streets. Jackson testified that neither he nor defendant was asked to accompany the police to the station. At the police station Jackson and defendant were placed in separate rooms and questioned. Ultimately, police placed both men in a lineup.

Coloia Wilkerson also testified for the defense. She stated that she, too, was picked up, handcuffed, placed in a police car and brought to the Area 4 station on January 19, 1994. She stated that she saw defendant in a holding room while at Area 4. Wilkerson further

testified that, after being held for seven or eight hours at Area 4, she was released between 3 and 4 a.m. on January 20, 1994.

Defendant testified on his own behalf at the hearing. He corroborated Jackson's version of how and when the police took him to the Area 4 station on January 19. After waiting alone in an interview room for approximately 45 minutes, an officer entered the room and began questioning him about the shooting of Handy on January 17, 1994. Roughly 90 minutes after this initial questioning, Chicago police detective Kristen Kato entered the room and began to question defendant. Defendant stated that he asked Kato if he could go home, to which Kato responded that they would have "to wait and see." Subsequently, Kato left defendant alone—locked in the interview room. Kato later returned and proceeded to question defendant "a lot." Defendant testified that he was handcuffed throughout his stay at the police station and that the police denied him the opportunity to make a phone call. Defendant stated that Detective Kato informed him around 9:15 p.m. that defendant was being charged with Handy's murder.

On cross-examination, defendant testified that he informed police he was a juvenile once he discovered he was being charged with murder. He also testified that he was placed in a police lineup some four or five hours after arriving at the police station. On redirect, defendant stated that he was never advised of his rights during the evening of January 19 and early morning hours of January 20. On recross, defendant acknowledged that he was presented with a form advising him of his rights, but only after he made his

inculpatory statement the next day; moreover, defendant claimed that he never read the form and that no one ever read the form to him.

Chicago police detective Eugene Roy testified for the State. Roy said that, around 8 p.m. on January 19, 1994, he and several other police officers obtained the name of defendant and Jackson from unknown individuals engaged in narcotics sales. These unknown individuals indicated to the police that defendant was "working security" for the narcotics operations near the murder scene around the time of the victim's death. Shortly thereafter, Detective Roy, Detective Kato and three other police officers located defendant and Jackson and asked the two young men to accompany them to the police station. Defendant and Jackson agreed, and the two were searched, placed in separate cars and driven to Area 4. Once they arrived at Area 4, defendant and Jackson were placed in separate interview rooms. The room defendant was placed in was locked. Defendant was never handcuffed. When asked, defendant lied to the police regarding his age and claimed to be 17. Although Roy did not consider defendant under arrest, he and Detective Kato advised defendant of his *Miranda* rights. This was done as a precaution, in the event that defendant might make a statement inculpating himself in Handy's homicide.

Roy further testified that defendant told the detectives that, while "working security" on January 17, the night of the murder, he overheard an argument between his cousin and the victim. After his cousin disappeared down a gangway, defendant heard the sound of three or four gunshots. Acting on this information, the detectives left Area 4 around midnight in an attempt to

locate defendant's cousin and other individuals mentioned by defendant in this initial statement. Coloia Wilkerson was one individual mentioned by defendant. Roy and Kato successfully located her and Cedric Smith and brought them to Area 4. When questioned, Ms. Wilkerson gave an account of January 17, 1994, that differed from that given by defendant. The police then confronted Jackson with Wilkerson's statement. Once confronted, Jackson informed police that defendant carried a 9 millimeter pistol while "working security" on the 17th, that defendant got into an argument with Handy, and that defendant disappeared into a gangway near the building where the shooting transpired shortly before gunshots rang out. Defendant was placed in a lineup at about 4 a.m., but the witness, Robert Banks, could not identify anyone. Following the lineup, police once again advised defendant of his *Miranda* rights and then confronted him with the statements of Wilkerson and Jackson. Defendant then made an inculpatory statement to Detectives Roy and Kato. Up until he made this inculpatory statement, defendant was free to go home—despite the fact that he was held in a locked room. Defendant was never informed that he was free to leave.

Several other police officers, including Detective Kristen Kato, also testified for the State and essentially corroborated Detective Roy's testimony. Kato expanded upon Roy's testimony, stating that defendant was placed under arrest at roughly 4:30 a.m. After making his incriminating statement, defendant informed the police that he was only 15 years old. A youth officer, Officer Halko, was contacted and he attempted to corroborate defendant's age. At approximately 6:45

a.m., Assistant State's Attorney Lu Ann Rodi arrived to take defendant's statement. Defendant was yet again informed of his *Miranda* rights, and Assistant State's Attorney Rodi transcribed his statement, which defendant then signed in the presence of Ms. Rodi, Officer Halko and Detective Halko. On cross-examination, Kato testified that the door was not locked when he left defendant alone in the interview room; however, Kato admitted that defendant was not free to move about the Area 4 police station.

After hearing this and other testimony, the trial court denied defendant's motion to quash his arrest and suppress statements. In denying the motion, the trial court specifically found that the defendant voluntarily accompanied the police to the station. This finding was based upon the fact that defendant indicated as much in his written statement. Moreover, when it denied defendant's motion to reconsider, the trial court noted that the locked door on the interview room did not automatically render defendant an arrestee.

The bench trial occurred on April 19, 1996. The State recalled many of the witnesses it had called during the hearing on defendant's motion to quash his arrest and suppress statements. One of these was Assistant State's Attorney Lu Ann Rodi. Ms. Rodi testified that she met with defendant alone and told him that she would talk to him, that she would give him his *Miranda* warnings when the officers returned, and that they "were going to have a statement." She then transcribed the inculpatory statement given by defendant on January 20, 1994. Through Ms. Rodi's testimony, that statement was admitted into evidence. In his written statement, transcribed by Ms. Rodi, defendant

acknowledged that he was apprised of and understood his *Miranda* rights.

Defendant's statement related the following pertinent facts: On the night of the murder defendant was "working security" near 825 North Lawndale while a friend, Shorty C, was selling drugs. Defendant was armed with a fully loaded, black gun. At approximately 8 p.m., the victim came toward the defendant's position and told him to "get away from the house or I will kick your ass." Defendant responded, "You can't tell me what to do," and a verbal confrontation ensued. This argument continued after the victim entered the house on Lawndale, as the victim shouted at defendant through an open, second-story window. The victim challenged defendant to come inside the house. Defendant tried to gain access to the house, but the door was locked. Defendant ultimately climbed through a window toward the rear of the house. After he entered through the window, defendant saw the victim about 15 feet away with a baseball bat. Defendant shot the victim about three times. As he tried to leave the house, defendant saw another man, to whom defendant said, "Get back in that room this is none of yours." When defendant discovered that both doors were locked, he left the house using the window by which he had entered. Upon leaving the house, defendant threw the gun away in the middle of the gangway. He never went back to look for it. Defendant also stated that, when police found him a few days later, he agreed to accompany them to the police station to tell them what he knew about the shooting.

Robert Banks also testified for the State. Banks lived at 825 North Lawndale as well, but on the first

floor. Herb Handy, the victim, lived on the second floor. On the night of the murder, Banks heard the victim come home and go upstairs. He could also hear someone yelling from outside up to the second-floor window. Banks stated that he then heard Handy open a window and yell, among other things, "Come on in, [expletive]," down to the person on the street. The discussion continued for four or five minutes, in Banks' estimation. After the yelling stopped, he saw Handy come downstairs and walk back into the kitchen of the house. Banks then heard a thumping or banging against the wall, followed by gunshots. The thumping sounded like a bat or a stick hitting the wall. Banks jumped up when he heard the gunshots and walked down the hall. He was then confronted by another, unknown man. This other man carried a gun, an automatic, and identified himself as the police; the intruder then instructed Banks to return to his room and lie down on the floor. Banks knew the man was not a police officer and refused to comply. Banks ran upstairs and prepared to jump out the window, but he called for help instead. Meanwhile, the intruder left the way he came in because both doors were locked. In a lineup conducted a few days later, Mr. Banks could not identify anyone as the intruder he saw.

Detective Ralph Vucko testified next. He stated that he and his partner responded to a call of a person shot at 825 North Lawndale on January 17, 1994, at approximately 8:30 in the evening. As he investigated the scene, he noted that the recently fallen snow had been disturbed and that a trail had been made in the snow in the gangway that abutted the south side of the building. The trail led to a partially opened window

near the rear of the house, where the snow had been disturbed on the ledge. Upon entering the house, Detective Vucko went into the room with the partially opened window he had just seen from the outside. In this room, he observed the victim—already dead but warm to the touch—lying on the ground with gunshot wounds to his chest and back and a bat in his hands. The victim was lying about eight feet away from the window. Vucko also discovered three 9 millimeter shell casings on the floor.

Detective Kato testified again at defendant's trial. Kato's trial testimony was consistent with the testimony he gave at the hearing on defendant's motion to quash his arrest and suppress statements.

Both parties stipulated as to evidence regarding the victim's autopsy. This stipulation stated, *inter alia,* that the victim died of multiple gunshot wounds and that the victim tested positive for cocaine.

At the close of the State's evidence, defendant moved for a directed verdict. The trial court denied the motion. Defendant also attempted to introduce evidence that would show the victim's violent and aggressive character, pursuant to *People v. Lynch,* 104 Ill.2d 194, 83 Ill.Dec. 598, 470 N.E.2d 1018 (1984). The trial court disallowed such evidence. Defendant then rested his case. In closing argument, defense counsel asserted that defendant acted in self-defense when he shot Herb Handy because Handy was violent and aggressive, on drugs and armed with a baseball bat. Alternatively, the defense argued that Handy provoked defendant into mutual combat; as a result, defendant was guilty only of second degree murder. The trial court found

defendant guilty of first degree murder and sentenced him to 26 years in the Illinois Department of Corrections.

Defendant's primary argument on appeal is that the trial court erred in denying the motion to quash his arrest and suppress statements. Defendant does not dispute the trial court's finding that he voluntarily accompanied police to the Area 4 police station. Instead, defendant asserts that at some point after he arrived at the Area 4 police station he was illegally detained without probable cause, and the trial court's ruling to the contrary was against the manifest weight of the evidence. We agree and reverse the trial court's order denying defendant's motion to quash his arrest.

A motion to quash arrest and suppress statements presents a trial court with a mixed question of law and fact. *People v. Kidd,* 175 Ill.2d 1, 25, 675 N.E.2d 910, 922 (1997). A reviewing court will not disturb the trial court's ruling on a motion to suppress unless it finds that ruling to be manifestly erroneous. *People v. Oaks,* 169 Ill.2d 409, 447, 662 N.E.2d 1328, 1345 (1996); *People v. Melock,* 149 Ill.2d 423, 599 N.E.2d 941 (1992). This is so because such determinations often require the trial court to resolve conflicts in the facts and weigh the credibility of witnesses. *Oaks,* 169 Ill.2d at 447, 662 N.E.2d at 1345. We acknowledge that the parties presented conflicting testimony at the hearing on the motion to quash. However, this record establishes several undisputed facts. When considering undisputed facts in a motion to suppress, so that neither the facts nor the credibility of witnesses is at issue, appellate courts may conduct a de novo review. *Oaks,* 169 Ill.2d at 447-48, 662 N.E.2d at 1345; *see*

also Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) (while findings as to relevant historical facts may be reviewed deferentially, the ultimate determination of probable cause should be reviewed de novo on appeal).

Both the United States and Illinois Constitutions protect an individual from seizure or arrest without probable cause. U.S. Const., amend. IV; Ill. Const.1970, art. I, §6; *People v. Williams,* 164 Ill.2d 1, 645 N.E.2d 844 (1994); *Melock,* 149 Ill.2d at 436, 599 N.E.2d at 946. Illegal detentions for excessive periods, absent probable cause, have also been deemed to violate an individual's constitutional rights. *People v. Walls,* 220 Ill.App.3d 564, 578-79, 581 N.E.2d 264, 273-74 (1991); *see also People v. R.B.,* 232 Ill.App.3d 583, 589, 597 N.E.2d 879, 883 (1992) ("Custodial interrogation on less than probable cause violates the fourth amendment whether or not the technical trappings of a formal arrest existed"). The test for determining whether a suspect has been arrested is whether, in light of the surrounding circumstances, a reasonable, innocent person would have considered himself free to leave. *Williams,* 164 Ill.2d at 11, 645 N.E.2d at 848; *Melock,* 149 Ill.2d at 437, 599 N.E.2d at 946. Additional considerations included in this analysis are the intent of the police officer, the understanding of the suspect, and whether the suspect was told that he was free to leave. *Melock,* 149 Ill.2d at 437, 599 N.E.2d at 946.

In their briefs, both the State and defendant offer the seven-factor analysis that our supreme court has determined should be reserved for fifth amendment compulsion issues. *Melock,* 149 Ill.2d at 432, 599

N.E.2d at 944; *see also In re J.W.*, 274 Ill.App.3d 951, 957, 654 N.E.2d 517, 521-22 (1995) (following *Melock*). Because the case *sub judice* presents a question of fourth amendment "arrest" rather than fifth amendment "custodial interrogation," this court will follow the distinction announced in *Melock* and focus on whether a reasonable person would have considered himself free to leave *J.W.*, 274 Ill.App.3d at 957, 654 N.E.2d at 522.

An examination of the record reveals several undisputed facts: (1) defendant, who was only 15 with no prior arrests, and Jackson were originally stopped on the street by five police officers; (2) defendant and Jackson rode to the Area 4 station in separate cars and were placed in separate interview rooms upon arriving at the police station; (3) defendant remained in the same interview room—with the door closed—from his arrival at the station (roughly 8:30 p.m.) until he made his incriminating statement (at 4:30 a.m. the following morning); (4) police officers apprised defendant of his *Miranda* rights several times; (5) defendant was not free to move about the police station; and (6) defendant was never informed that he was free to leave the station. Moreover, both defendant and Detective Roy testified that the door to defendant's interview room was locked.

After reviewing the aforementioned facts, we can only conclude that a reasonable, innocent person placed in defendant's position would not have felt himself free to leave. The State does not contend that probable cause to arrest defendant existed prior to his inculpatory statement. Even if we accept the trial court's finding that defendant voluntarily accompanied the

police, we believe that defendant's presence at the Area 4 station escalated to an involuntary seizure prior to his formal arrest. *R.B.*, 232 Ill.App.3d at 592, 597 N.E.2d at 885; *Walls*, 220 Ill.App.3d at 579, 581 N.E.2d at 274 (finding it difficult to believe "that citizens typically agree to spend extended periods of time at police stations, kept in small windowless rooms, waiting for the police to conduct their investigations and obtain probable cause for their arrest"). Absent probable cause, the involuntary seizure of defendant constituted a violation of his fourth amendment rights. We therefore find that the ruling of the trial court denying defendant's motion to quash was manifestly erroneous.

In reaching our decision, special weight was given to defendant's age and lack of criminal background at the time of the occurrence. "[C]ourts must be especially cautious in cases involving juveniles because the coerciveness of a situation is thereby enhanced." *People v. Cole*, 168 Ill.App.3d 172, 179, 522 N.E.2d 635, 639 (1988) (16-year-old defendant with no prior experience with the criminal justice system was seized in violation of his fourth amendment rights); *see also R.B.*, 232 Ill.App.3d at 592, 597 N.E.2d at 885 (illegal seizure of a 15-year-old defendant); *J.W.*, 274 Ill.App.3d 951, 654 N.E.2d 517 (1995) (illegal seizure of a 14-year-old defendant). The State fails to cite to any case in which a court determined that a minor, detained in a fashion analogous to defendant's experience, was legally seized. Although defendant failed to inform the police of his true age until after his formal arrest, the fact remains that defendant was a 15-year-old minor throughout his questioning by police.

Of course, a finding that defendant was subject to an illegal arrest does not resolve the question of whether defendant's inculpatory statement was properly admissible at trial. *People v. Barlow*, 273 Ill.App.3d 943, 654 N.E.2d 223 (1995); *Walls*, 220 Ill.App.3d at 579, 581 N.E.2d at 274. "A confession obtained after an illegal arrest may be admissible where it was obtained by means sufficiently distinguishable to be purged of the taint of the illegal arrest." *Barlow*, 273 Ill.App.3d at 952, 654 N.E.2d at 231. The determination of whether a confession was sufficiently attenuated from the illegal arrest hinges upon the following considerations: (1) the temporal proximity between the arrest and the confession; (2) the existence of intervening circumstances; (3) the purpose and flagrancy of the police misconduct; and (4) whether the defendant received *Miranda* warnings. *Barlow*, 273 Ill.App.3d at 952, 654 N.E.2d at 231; *J.W.*, 274 Ill.App.3d at 962-63, 654 N.E.2d at 525. In light of its ruling on defendant's motion to quash his arrest, the trial court never considered the attenuation issue. Remandment for an attenuation hearing is appropriate where the record is not clear enough to allow a reviewing court to make an independent ruling on the matter. *Walls*, 220 Ill.App.3d at 579, 581 N.E.2d at 274 (confrontation of a defendant with statements from other witnesses inculpating that defendant as the shooter may have attenuated a confession from the illegal arrest). Accordingly, we reverse defendant's conviction and remand this cause for a hearing to determine whether defendant's inculpatory statement was sufficiently attenuated from his illegal arrest to warrant its admissibility. *See Barlow*, 273 Ill.App.3d at 953, 654 N.E.2d at 231 (citing cases).

Defendant next argues that Assistant State's Attorney Rodi, who transcribed defendant's inculpatory statement, improperly advised him of his *Miranda* rights. In support of this contention, defendant points to Ms. Rodi's trial testimony in which she stated that she would give defendant his *Miranda* warnings when the officers returned and that they "were going to have a statement." Defendant argues that Ms. Rodi's statement vitiated the effect of any proper *Miranda* warnings and hence rendered the statement involuntary. The State points out (and defendant concedes) that a trial court's ruling that a statement is voluntary will not be disturbed unless that ruling is against the manifest weight of the evidence. *People v. Miller,* 173 Ill.2d 167, 181, 670 N.E.2d 721, 728 (1996). In the present case, ample evidence supported the trial court's conclusion that defendant was apprised of and understood his *Miranda* rights. We reject defendant's second point of error.

Defendant also asserts that the trial court erred in excluding defense evidence regarding the victim's allegedly violent and aggressive character, where such evidence was properly admissible under *Lynch.* "[W]hen the theory of self-defense is raised, the victim's aggressive and violent character is relevant to show who was the aggressor, and the defendant may show it by appropriate evidence, regardless of when he learned of it." *People v. Lynch,* 104 Ill.2d 194, 200, 470 N.E.2d 1018, 1020 (1984). Nevertheless, a decision on the admission of evidence is within the sound discretion of the trial court, and such evidentiary rulings will be upheld absent a clear showing that the court abused its discretion. *People v. Booker,* 274

Ill.App.3d 168, 653 N.E.2d 952 (1995). The evidence here established that the victim was entitled to be inside 825 North Lawndale when defendant climbed through an open window and shot the victim several times, causing his death. In light of this evidence, defendant's self-defense claim was spurious at best and the trial court did not abuse its discretion in excluding the proffered Lynch testimony. Defendant's third challenge on appeal must fail.

Defendant further argues that the trial court erred when it admitted Detective Kato's testimony regarding the steps of his investigation, where that testimony contained prejudicial hearsay. Defendant complains that Kato was permitted to testify as to what Coloia Wilkerson told him and that the alleged hearsay statement of Wilkerson damaged defendant's credibility. The State counters that Wilkerson's out-of-court statement was not offered to prove the truth of the matter asserted and therefore did not constitute hearsay. "A police officer may testify about statements made by others, such as victims or witnesses, when such testimony is not offered to prove the truth of the matter asserted, but is instead used to show the investigative steps taken by the officer leading to the defendant's arrest." *People v. Pulliam*, 176 Ill.2d 261, 274, 680 N.E.2d 343, 350 (1997). We agree with the State and find that Wilkerson's statement was not offered for its truth; as such, the statement was not hearsay and Kato's testimony was entirely proper.

As his final point of error, defendant argues that his conviction for first degree murder should be reduced to second degree murder because the evidence established that defendant had an unreasonable belief that he

needed to use deadly force in self-defense and because the victim seriously provoked defendant. When reviewing a challenge of this sort, the appellate court must consider whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the mitigating factors were not present. *People v. Blackwell,* 171 Ill.2d 338, 358, 665 N.E.2d 782, 790 (1996).

In this case, either the presence of a serious provocation or an unreasonable belief in the need for deadly force would constitute a mitigating factor. As support for his claim of serious provocation, defendant points to the harsh and abusive language of the victim. We reject this assertion. "Mere words and gestures, however, are not enough to constitute serious provocation." *Blackwell,* 171 Ill.2d at 358, 665 N.E.2d at 791. Alternatively, defendant argues that he had an unreasonable belief that deadly force was necessary, in light of the fact that the victim carried a baseball bat. The overwhelming evidence presented to the trial court nullified this fact, namely, defendant's trespass onto the crime scene (by climbing through a window) while armed with a 9 millimeter semiautomatic handgun. A rational trier of fact could have found that the suggested mitigating factors were not present. As a result, defendant's fifth and final point of error lacks merit.

In light of the foregoing analysis, we reverse defendant's conviction and remand this case to the trial court for an attenuation hearing regarding defendant's inculpatory statement. Should the trial court find defendant's confession sufficiently attenuated from his illegal arrest, we direct the court to reinstate defendant's conviction. In the alternative, if the trial

court determines that no such attenuation exists to purge the confession from the taint of defendant's illegal arrest, we direct the trial court to suppress the confession and conduct further proceedings consistent with this opinion. *Barlow,* 273 Ill.App.3d at 953, 654 N.E.2d at 231; *J.W.,* 274 Ill.App.3d at 963, 654 N.E.2d at 525.

Reversed and remanded.

SHEILA M. O'BRIEN, P.J., and BUCKLEY, J., concur.

Presiding Justice SHEILA M. O'BRIEN specially concurring.

I concur with the result of the majority but disagree with the majority's analysis that the defendant's presence "escalated" to an involuntary seizure at some undefined time prior to his formal arrest. In this case, once the door to the room containing the defendant was locked, it was objectively true that the defendant was not free to leave and was thus, in custody.

On all other issues, I concur.

No. 1-00-0922
IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

ANDRE WALLACE,

Defendant-Appellant.

ORDER

[August 31, 2001]

Following a bench trial, defendant Andre Wallace was convicted of first degree murder and sentenced to 26 years in prison. On appeal, defendant contends that the trial court erred in finding that his inculpatory statement was attenuated from his illegal arrest. Defendant argues that the attenuation rested upon an incriminating statement from Laron Jackson, whose arrest defendant contends was also illegal. Defendant argues that Jackson's statement thus did not constitute an intervening circumstance that could attenuate defendant's confession. Because we agree with defendant, we reverse and remand this case for a new trial.

Defendant was convicted of the January 17, 1994, murder of Herb Handy at 825 North Lawndale Avenue in Chicago. On January 19, Chicago police questioned defendant at the police station. At that time, defendant was 15 years old, The following day, defendant was arrested for Handy's murder.

Defendant moved to quash his arrest and suppress his statement. At the motion hearing, Jackson testified

that at about 8 p.m. on January 19, he and defendant were walking in the 800 block of North Lawndale when police stopped them. Jackson and defendant were searched, handcuffed and driven to the Area 4 police station, where they were placed in separate rooms, questioned and later placed in a lineup.

Defendant offered testimony consistent with Jackson's regarding how he and Jackson were taken to the police station on January 19. Defendant was interviewed about 45 minutes after his arrival at the station and was questioned by Chicago Police Detective Kriston Kato after another 90 minutes. When defendant asked if he could go home, Kato said they would have "to wait and see." Defendant was locked in the interview room and was handcuffed throughout his stay at the police station. He was not allowed to make a phone call. Kato told defendant at about 9:15 p.m. that he was being charged with murdering Handy.

Defendant testified on cross-examination that after he learned he was being charged with murder, he told police that he was a juvenile. He was placed in a lineup four or five hours after arriving at the police station. Defendant testified on redirect examination that he was not advised of his *Miranda* rights until after he made his statement, when he was presented with a form. Defendant stated he did not read the form and that it was not read to him.

Coloia Wilkerson testified that she was also picked up by police on January 19, handcuffed and brought to the Area 4 station, where she was held for seven or eight hours before being released.

For the prosecution, Chicago Police Detective Eugene Roy testified that at about 8 p.m. on January 19, he and other officers learned from sources engaged in narcotics sales that defendant was "working security" for drug transactions near where Handy's murder took place. Roy was also given Jackson's name. Roy, Kato and three other officers located defendant and Jackson, who agreed to accompany them to the station. Defendant was placed in a locked interview room but was not handcuffed. Jackson was placed in a separate interview room. Roy stated that defendant was advised of his *Miranda* rights in the event that he made an inculpatory statement, even though Roy did not consider defendant to be under arrest.

Roy testified that defendant told police that on the night of January 17, he was "working security" when he overheard an argument between his cousin and Handy. After defendant's cousin went down a gangway, defendant heard three or four shots fired. Police located people mentioned in defendant's statement, including Wilkerson, who gave an account of the events different from that of defendant.

Roy testified that police then confronted Jackson, who told them that defendant had a gun on the night of the shooting. Jackson stated that defendant and Handy argued, and defendant disappeared into a gangway near the building where the shooting occurred shortly before shots were fired. Defendant was placed in a lineup but was not identified.

Police again advised defendant of his *Miranda* rights and confronted him with Wilkerson's and Jackson's statements. Defendant was arrested at 4:30

a.m. on January 20. Beginning at about 6:45 a.m., Assistant Cook County State's Attorney Lu Ann Rodi transcribed defendant's statement, in which he confessed to Handy's murder. Defendant was given his *Miranda* rights again before making his statement, which defendant signed.

The trial court denied defendant's motion to quash his arrest, finding that he had voluntarily accompanied the police to the station, as he had acknowledged in his written statement. In addition, the court denied defendant's motion to reconsider. On appeal, this court found the trial court's ruling manifestly erroneous, stating that even if defendant voluntarily went to the station, police lacked probable cause to detain defendant prior to his inculpatory statement. *People v. Wallace*, 299 Ill.App.3d 9, 17-18, 701 N.E.2d 87, 92 (1998) (*Wallace I*). This court further recognized that defendant's statement could be admissible if it was sufficiently attenuated from his illegal arrest; therefore, we reversed defendant's conviction and remanded for an attenuation hearing. *Wallace I*, 299 Ill.App.3d at 18-19, 701 N.E.2d at 93.

At the attenuation hearing. Kato testified that defendant and Jackson agreed to go with Kato, Roy and another detective to Area Four headquarters. At about 8:30 p.m., Kato advised defendant of his rights under *Miranda* and defendant indicated that he understood each right. Kato testified that defendant stated he was 17 years old.

Kato and Roy spoke to Jackson, who was in a separate interview room. Jackson was not handcuffed. Kato advised Jackson of his *Miranda* rights, which he

indicated he understood. Kato testified he thought Jackson said he was 18 years old. Jackson told the officers that at the time of the shooting, he was in the 800 block of North Lawndale and heard gunshots near Chicago Avenue. Jackson said he was near "a dope spot" and was "working security" with Ced.

Defendant told Kato the names of two other people who were "working security" that night. Kato left defendant in the interview room and told him to "knock on the door" if he needed anything. Kato stated that the door was locked. Kato and Roy went back to the 800 block of North Lawndale, located Ced and Wilkerson and brought them to the police station. Kato confronted Jackson with a statement from Wilkerson, and Jackson then implicated defendant in the murder. Jackson stated that defendant had a gun and argued with someone inside 825 North Lawndale. Jackson saw defendant go toward a gangway, heard shots fired and saw defendant emerge from the gangway holding the weapon.

Kato testified that Jackson made this statement at approximately 1:30 a.m. At about 4 a.m., police conducted a lineup viewed by a man who had been inside 825 North Lawndale and briefly saw the gunman inside the house after the shooting. The man did not identify defendant in the lineup.

After the lineup, Kato and Roy again interviewed defendant after advising him of his *Miranda* rights. After being confronted with the statements of Wilkerson and Jackson, defendant gave an inculpatory statement. Defendant also told the officers that he was 15 years old, not 17 years old as he had stated earlier.

Kato testified that Jackson, Wilkerson and Ced were not placed in locked interview rooms.

On cross-examination, Kato stated that from the time defendant was taken to the station until when he appeared in the lineup, defendant was not free to leave. Kato stated on redirect examination that he confronted Jackson with Wilkerson's account of the shooting and questioned defendant about those two statements. On recross, Kato stated that at about 1:45 a.m., Jackson implicated defendant in the shooting. Jackson had been in a locked room since 11 p.m.

The trial court ruled that defendant was in custody without probable cause when he mentioned Wilkerson to police, and that because police questioned Wilkerson based upon information received from defendant while he was unlawfully detained, the court could not consider whether Wilkerson's statements were an intervening factor to attenuate the taint of defendant's illegal detention. The court further held that Jackson was illegally detained "but that his statements regarding [defendant's] actions with respect to the shooting were otherwise voluntary and reliable * * * " Based upon the totality of the circumstances, the court found that an intervening factor of probable cause existed before defendant made his statement to Rodi. In addition, the court stated that Jackson's statements "were not derived from or exploit[ive] of defendant's illegal detention."

On appeal, defendant contends that because Jackson, like defendant, was illegally detained, the trial court erred in finding that the statements Jackson made to police prior to defendant's inculpatory statement

attenuated the taint of defendant's illegal arrest. Defendant argues that the trial court incorrectly relied upon Jackson's statement as an intervening factor that provided the police with probable cause to arrest defendant.

The State initially challenges the trial court's finding that Jackson was illegally detained. The State asserts that Jackson's statement did not result from an illegal detention because he was 18 years old, voluntarily accompanied the officers to the police station, was kept at the station for about five hours and was advised of his *Miranda* rights. The test to determine whether a suspect has been arrested is whether, in light of the surrounding circumstances, a reasonable innocent person would have considered himself free to leave. *People v. Williams,* 164 Ill.2d 1, 11, 645 N.E.2d 844, 848 (1994). This analysis also includes consideration of the intent of the police officer, the understanding of the suspect, and whether the suspect was told that he was free to leave. *People v. Melock,* 149 Ill.2d 423, 437, 599 N.E.2d 941, 946 (1992). We disagree with the State's contention that despite the similar circumstances of Jackson and defendant's detentions, the fact that Jackson was 18 (compared to defendant's age of 15) was sufficient to render Jackson's detention legal. As this court concluded in *Wallace I,* defendant and Jackson were stopped on the street by five police officers and taken to the police station in separate cars. At the attenuation hearing, Kato ultimately acknowledged upon re-cross examination that Jackson was kept in a locked room. Jackson's age of majority does not alter those facts and automatically render his detention legal.

We therefore consider whether Jackson's illegal detention affects the admissibility of defendant's statement. To establish that a defendant's statement was admissible despite his or her illegal arrest, the State must show that the statement was a product of the defendant's free will and was independent of any taint of the illegal arrest. *People v. White,* 117 Ill.2d 194, 222, 512 N.E.2d 677, 687 (1987); *People v. Berry,* 314 Ill.App.3d 1, 15, 731 N.E.2d 853, 865 (2000). In evaluating the admissibility of a statement taken from a defendant who was arrested in violation of the fourth amendment, a court considers the following factors: (1) whether the defendant received any *Miranda* warnings; (2) the time period between the arrest and the statement; (3) the purpose and flagrancy of the official misconduct; and (4) the existence of any intervening circumstances. *Brown v. Illinois,* 422 U.S. 590, 603-04, 45 L. Ed. 2d 416, 427, 95 S. Ct. 2254, 2261-62 (1975). The burden of demonstrating attenuation between the illegal conduct and a defendant's subsequent confession sufficient to render the confession admissible rests upon the State. *Brown,* 422 U.S. at 604, 95 S. Ct. at 2262, 45 L Ed. 2d at 427. In the case at bar, defendant was given *Miranda* warnings. Slightly less than 11 hours elapsed between defendant's arrest and his inculpatory statement.

This court has recently recognized that the existence or absence of intervening factors and the conduct of police have emerged as the most relevant factors in the *Brown* analysis. *Berry,* 314 Ill.App.3d at 17, 731 N.E.2d at 866. An intervening circumstance is "one that dissipates the taint of unconstitutional police conduct by breaking the causal connection between the

illegal conduct and the confession." *People v. Turner,* 259 Ill.App.3d 979, 993, 631 N.E.2d 1236, 1245 (1994). The confrontation of an arrestee with information that is untainted by an illegal arrest is an intervening circumstance that can spur a voluntary confession, which would be admissible. *People v. Austin,* 293 Ill.App.3d 784, 788, 688 N.E.2d 740, 743 (1997). Because the facts of this case and the credibility of witnesses are not challenged, this court encounters a question of law, which we review *de novo. People v. Foskey,* 136 Ill.2d 66, 76, 554 N.E.2d 192, 197 (1990).

The State asserts that attenuation was present because Jackson's statement was not causally connected to defendant's illegal arrest. The State maintains that Jackson was brought to the police station as a result of an anonymous tip and not as a result of information provided by defendant and that Jackson implicated defendant after being confronted with Wilkerson's statement. The State argues that those intervening circumstances attenuated defendant's statement from his illegal arrest and provided the police with probable cause to arrest and detain defendant.

The State cites *Berry* and *Austin* in support of its contention that "confronting a suspect with the statement of another suspect or with some other evidence of guilt may serve as an intervening factor that purges the taint of an illegal arrest." We find that those cases differ from the circumstances in the case at bar. In *Berry,* this court held that the defendant's confession provided police with probable cause to detain and question his co-defendant and was an intervening factor to attenuate the co-defendant's confession because the defendant's statement was not the result of an illegal

arrest. *Berry*, 314 Ill.App.3d at 16, 731 N.E.2d at 866. Here, we have concluded that Jackson was illegally detained when he told police of defendant's involvement in the shooting. The facts of Berry are therefore inapposite to those here.

We also fail to see how *Austin* supports the State's position. In *Austin*, the trial court found that an individual's statement that provided authorities with probable cause to arrest the defendant constituted an intervening circumstance to attenuate the defendant's confession. *Austin*, 293 Ill.App.3d at 789, 688 N.E.2d at 743. However, this court reversed and remanded for a new trial, citing precedent that statements obtained in the course of illegal arrests could not attenuate the taint of *another's* illegal arrest. *Austin*, 293 Ill.App.3d at 790-91, 688 N.E.2d at 744-45. In reaching that conclusion, the *Austin* court expressly rejected the analyses employed in two additional cases on which the State relies in this appeal, namely *People v. Lekas*, 155 Ill.App.3d 391, 508 N.E.2d 221 (1987), and *People v. Pierson*, 166 Ill.App.3d 558, 519 N.E.2d 1185 (1988).

Instead, the court in *Austin* expressly relied upon *People v. Bates*, 267 Ill. App. 3d 503, 642 N.E.2d 774 (1994). In *Bates*, the defendant confessed after police confronted him with statements by a co-defendant whose confession had already been found to have been coerced. *Bates*, 267 Ill. App. 3d at 506, 642 N.E.2d at 777. This court held that because the statements by the co-defendant regarding the defendant's involvement in the crime were coerced, they could not be used as an intervening factor to attenuate the taint of the defendant's illegal arrest. *Bates*, 267 Ill.App.3d at 506-07, 642 N.E.2d at 777. The State also cites

People v. Wright, 294 Ill. App. 3d 606, 691 N.E.2d 94 (1998), in support of its contentions. In *Wright,* this court found that the statement of defendant's brother, considered along with the other *Brown* factors, attenuated the taint of defendant's illegal arrest; however, the *Wright* court noted that its analysis would change if the brother's statement "might be said to be tainted by an illegal arrest." *Wright,* 294 Ill.App.3d at 613, 691 N.E.2d at 99.

Such is the case here, since Jackson's detention was illegal. Defendant gave his inculpatory statement after he was confronted with Jackson's statement. Jackson told police that defendant had a gun when he entered a gangway where Jackson heard shots fired. Jackson also stated that defendant exited the gangway holding a gun. Contrary to the State's assertions, the fact that police questioned Wilkerson before interrogating Jackson and gathered additional information prior to defendant's confession does not negate the fact that Jackson's statement was procured during Jackson's own illegal detention after Jackson and defendant were brought to the police station together. Jackson's statement therefore could not properly be used to attenuate the taint of defendant's illegal arrest. *See People v. Beaman,* 255 Ill.App.3d 63, 70, 627 N.E.2d 316, 321 (1993); *People v. Avery,* 180 Ill.App.3d 146, 155-56, 534 N.E.2d 1296, 1302 (1989) (confronting a defendant with statement from another individual who was illegally arrested did not constitute intervening circumstance to attenuate taint of the defendant's illegal arrest).

For the foregoing reasons, the judgment of the trial court is reversed and the case is remanded for a new trial in which defendant's confession must be suppressed.

Reversed and remanded.

GALLAGHER, J., with BUCKLEY and O'BRIEN, JJ., concurring.